

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE,
INC.,

Plaintiff,

v.

ZILLOW, INC., et al.

Defendants.

Case No. 2:21-cv-00312-TSZ

**PLAINTIFF’S RESPONSE TO
THE JURY INSTRUCTIONS
PROPOSED BY THE COURT**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE COURT SHOULD GIVE A “SUBSTANTIAL FACTOR” INSTRUCTION	1
III. THE COURT SHOULD NOT GIVE A NOMINAL DAMAGES CHARGE.	2
A. It is REX’s prerogative to request or waive a nominal damages charge.	3
B. REX is willing to accept an adverse verdict if the jury awards no compensatory damages.	4
IV. THE COURT SHOULD NOT CHANGE INSTRUCTION 15A.....	4
V. CONCLUSION.....	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Abbott Labs.v. Adelphia Supply US</i> , 15CV5826CBALB, 2019 WL 5696148 (E.D.N.Y. Sept. 30, 2019).....	2
<i>American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.</i> , 640 F. Supp. 1411 (E.D.N.C. 1986).....	2
<i>Azimi v. Jordan’s Meats Inc.</i> , 456 F.3d 228 (1st Cir. 2006).....	3
<i>Bracco Diagnostics, Inc. v. Amersham Health, Inc.</i> , 627 F. Supp. 2d 384 (D.N.J. 2009)	1
<i>Hydro Inv’rs, Inc. v. Trafalgar Power Inc.</i> , 227 F.3d 8 (2d Cir. 2000).....	2
<i>Klem v. Wash. Mut Bank</i> , 176 Wn2d 771, 295 P.3d 1179 (2013).....	4
<i>Peerless Heater Co. v. Mestek, Inc.</i> , No. 98–6532, 2000 WL 637082 (E.D. Pa. May 12, 2000)	2
<i>Randolph v. Metropolitan Transportation Authority</i> , 17cv1433(DLC), 2019 WL 1567663 (S.D.N.Y. Apr. 11, 2019)	4
<i>Rush v. Blackburn</i> , 190 Wn. App. 945, 361 P.3d 2017 (2015)	4
<i>Salazaar v. Encinas</i> , 242 F.3d 390 (Table), 2000 WL 1843240 (10th Cir. 2000)	4
<i>Seven–Up v.Coca–Cola</i> , 86 F.3d 1379 (5th Cir. 1996)	2
<i>Vilkhu v. City of New York</i> , No. 06 Civ. 2095, 2009 WL 537495 (E.D.N.Y. Mar. 2, 2009), <i>aff’d</i> 372 F. App’x. 222 (2d Cir. 2010).....	3
<u>Statutes</u>	
15 U.S.C. §45(n)	4

1 **I. INTRODUCTION**

2 The Court provided the Parties with updated revised draft jury instructions on
3 September 26, 2023 (the “Fourth Proposed Jury Instructions”). REX hereby requests two
4 changes to the Fourth Proposed Jury Instructions.

5 *First*, the Court has proposed removing “substantial factor” language from
6 Instruction 16. REX objects to that removal.

7 *Second*, the Court has proposed adding a nominal damages instruction to
8 Instruction 17. REX objects to that addition.

9 Additionally, Zillow has requested that the Court narrow Instruction 15A. REX
10 objects to Zillow’s request.

11 **II. THE COURT SHOULD GIVE A “SUBSTANTIAL FACTOR”**
12 **INSTRUCTION**

13 In the Fourth Proposed Jury Instructions, the Court’s proposed Instruction 16
14 regarding proximate cause strikes the following language: “Injury or damages are caused
15 by an act or a failure to act whenever it appears from the evidence that the act or failure to
16 act *played a substantial part in bringing about or actually causing the injury or*
17 *damages*, and that the injury or damages were either a direct result or a reasonably probable
18 consequence of the act or omission.” (emphasis added).

19 Removing the substantial factor language would ignore its applicability in false
20 advertising cases. “Numerous courts have applied the material factor test in the false
21 advertising context” under the Lanham Act. *Bracco Diagnostics, Inc. v. Amersham Health,*
22 *Inc.*, 627 F. Supp. 2d 384, 486 (D.N.J. 2009) (collecting cases). Thus, in a false advertising
23 claim under the Lanham Act, REX is entitled to damages if it shows that the Zillow
24 Defendants’ misconduct was “a material factor (also called a ‘substantial’ factor) in
25 [REX’s] losses.” *Id.* (citing ample support for the application of the “substantial factor”
26 test in false advertising cases).

In *Seven-Up v. Coca-Cola*, the Fifth Circuit, noting that “[t]he jury . . . concluded [the defendant’s] presentation was a substantial factor in causing bottlers to switch to defendant’s product,” explained that “it is only necessary that plaintiff demonstrate that defendant’s illegal conduct was a substantial cause of injury to plaintiff’s business. Plaintiff is not required to prove that the defendant’s conduct was the only or even the predominant cause of this injury.”). 86 F.3d 1379, 1387 n.12 (5th Cir. 1996) (quoting *American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411, 1444 (E.D.N.C. 1986)); see also *Peerless Heater Co. v. Mestek, Inc.*, No. 98–6532, 2000 WL 637082, at *4, at *11 (E.D. Pa. May 12, 2000) (“To satisfy this causation requirement [for the Lanham Act], the plaintiff must prove that the defendants’ activities were a material cause of the injury, but need not eliminate all possible alternative sources of injury as the cause of its injury.”).

Similarly, in *Abbott Labs. v. Adelphia Supply US*, a New York district court found that in a Lanham Act action, the “proximate cause determination does not require a jury to identify the liable party as the sole cause of harm; it only asks that the identified cause be a substantial factor in bringing about the injury.” 15CV5826CBALB, 2019 WL 5696148, at *50 (E.D.N.Y. Sept. 30, 2019) (quoting *Hydro Inv’rs, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 15 (2d Cir. 2000)).

Because false advertising claims generally, and Lanham Act claims in particular, admit of liability where the defendant’s conduct was merely a substantial factor in the plaintiff’s injury, the Court should not strike the substantial factor language from Instruction 16.

III. THE COURT SHOULD NOT GIVE A NOMINAL DAMAGES CHARGE.

The Court has proposed adding the following language to Instruction 17:

With respect to plaintiff’s first claim for false advertising in violation of the Lanham Act, the law authorizes an award of nominal damages. If you find for plaintiff with respect to its first claim, but you find that plaintiff has failed to prove damages as defined in this instruction, then you must award nominal damages. Nominal damages may not exceed one dollar.”

1 (the “Nominal Damages Instruction”).

2 REX objects to the addition of the Nominal Damages Instruction and represents
3 that, if the Court declines to instruct the jury on nominal damages, REX is willing to accept
4 an adverse verdict should the jury ultimately find liability but not award REX
5 compensatory damages.

6 **A. It is REX’s prerogative to request or waive a nominal damages charge.**

7 “[I]t is plaintiff’s prerogative to request or to waive a nominal damages charge.
8 Regardless of the cost or benefit to the plaintiff, a plaintiff is entitled to determine
9 independently the type of relief he or she will seek.” *Vilkhu v. City of New York*, No. 06
10 Civ. 2095, 2009 WL 537495, at *6 n.6 (E.D.N.Y. Mar. 2, 2009), *aff’d* 372 F. App’x. 222
11 (2d Cir. 2010).

12 Providing plaintiffs with this choice recognizes that the nominal damages charge is
13 for a plaintiff’s benefit, not the defendant’s. 2009 WL 537495, at *5 (“[T]he availability of
14 nominal damages, where appropriate, is intended to benefit the plaintiff.”) (collecting
15 cases). The *Vilkhu* court offers a succinct and perspicacious description of the “strategic
16 choice” plaintiffs face when deciding whether to seek a nominal damages jury charge:

17 In cases where the proof of plaintiff’s injury is slim or contested . . . a
18 nominal damages instruction affords the jury an opportunity to engage in
19 improper compromise. In such cases, a plaintiff should be allowed to
20 determine whether to seek both nominal and compensatory damages, or
21 whether to remove the option of nominal damages from the jury’s
22 consideration and instead seek an outcome in his case based on his showing
23 of proximately caused actual injury. To afford a defendant an equal right to
24 a nominal damages charge in such a case would preclude a plaintiff from
25 making this strategic choice.

26 *Id.* at *5–6.

27 Here proof of plaintiff’s injury is clearly contested and so plaintiff should be
28 permitted to choose whether or not to seek a nominal damages instruction. Other courts
have also recognized a plaintiff’s prerogative to request or decline such an instruction. *See,*
e.g., Azimi v. Jordan’s Meats Inc., 456 F.3d 228, 240 (1st Cir. 2006) (acknowledging the

1 “strategic choice whether to ask for a nominal damages instruction,” given that “there are
 2 good reasons why a plaintiff may choose not to give a jury the ‘out’ of awarding nominal
 3 damages as an alternative to awarding compensatory damages”); *Salazaar v. Encinas*, 242
 4 F.3d 390 (Table), 2000 WL 1843240 (10th Cir. 2000) (acknowledging plaintiff’s “strategic
 5 choice” to not give nominal damages instruction).

6 **B. REX is willing to accept an adverse verdict if the jury awards no**
 7 **compensatory damages.**

8 When a plaintiff waives its right to have the jury receive a nominal damages
 9 instruction, that plaintiff accepts the risk of an adverse judgment notwithstanding a jury
 10 finding of liability. For example, in *Randolph v. Metropolitan Transportation Authority*,
 11 the “plaintiff argued that it is within the Court’s discretion not to issue a nominal damages
 12 charge and that he should be afforded the strategic choice of waiving a nominal-damages
 13 charge in this case.” No. 17cv1433(DLC), 2019 WL 1567663, at *3 (S.D.N.Y. Apr. 11,
 14 2019). The *Randolph* court “allowed the plaintiff to waive a request for an award of
 15 nominal damages, but explained that should the jury fail to award compensatory damages,
 16 a verdict in favor of the defendants shall be entered notwithstanding any jury finding of
 17 liability.” *Id.* REX understands this risk and is willing to accept it.

18 **IV. THE COURT SHOULD NOT CHANGE INSTRUCTION 15A**

19 Zillow asks the court to delete the phrase “competitors, or other businesses” from
 20 instruction 15A. The Court should decline to do so. The language Zillow wants to strike is
 21 drawn directly from *Rush v. Blackburn*, 190 Wn. App. 945, 961–63, 361 P.3d 2017 (2015)
 22 (“whether it causes substantial injury to consumers (or competitors or other businessmen”).
 23 Zillow argues the Court should change the instruction to copy verbatim the language in 15
 24 U.S.C. §45(n). But *Klem v. Wash. Mut Bank*, 176 Wn2d 771, 787, 295 P.3d 1179 (2013)
 25 explicitly states: “Although we have been guided by federal interpretations, Washington
 26 has developed its own jurisprudence regarding the application of Washington’s CPA.”
 27 Zillow has not explained why this Court should blindly adopt the narrower language in the
 28

1 federal statute, given Washington's practice of developing its own CPA jurisprudence and
2 the legislature's commitment to a liberal construction of the CPA.

3 **V. CONCLUSION**

4 For the foregoing reasons, REX asks that the Court not remove the substantial
5 factor language from Instruction 16, not include the nominal damages instruction as part
6 of Instruction 17, and reject Zillow's request to narrow Instruction 15A.

7
8 Dated: September 28, 2023

BOIES SCHILLER FLEXNER LLP

9 By: /s/ Carl E. Goldfarb

10 Carl E. Goldfarb (Admitted *Pro Hac Vice*)

11 BOIES SCHILLER FLEXNER LLP

12 401 East Las Olas Blvd., Suite 1200

13 Fort Lauderdale, FL 33301

14 Telephone: (954) 356-0011

15 Facsimile: (954) 356-0022

16 cgoldfarb@bsfllp.com

17 Ursula Ungaro

18 Stephen N. Zack

19 Boies Schiller Flexner LLP

20 100 SE 2nd Street, Suite 2800

21 Miami, FL 33131

22 Telephone: (305) 539-8400

23 Facsimile: (305) 539-1307

24 uungaro@bsfllp.com

25 szack@bsfllp.com

26 James Denvir

27 Boies Schiller Flexner LLP

28 1401 New York Ave, NW

Washington, D.C, 20005

Telephone: (202) 237-2727

Facsimile: (202) 237-6131

jdenvir@bsfllp.com

David Boies
Boies Schiller Flexner LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300
dboies@bsfllp.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2023, I served foregoing document to be filed in this Court's CM/ECF system, which will send notification of such filing to the counsel of record.

By: /s/ Carl E. Goldfarb
Carl E. Goldfarb, Esq.